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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS
Petitioner,

v.

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SECTION 5 DOES NOT GRANT CONGRESS THE POWER TO ENFORCE EXTRA-CONSTITUTIONAL RIGHTS; *KATZENBACH v. MORGAN* IS INCONSISTENT WITH THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT AND SHOULD BE OVERRULED 5

II. EVEN ASSUMING THAT THE *MORGAN* POWER MAY BE LEGITIMATELY EXERCISED IN SOME CASES, IT SHOULD NOT BE INVOKED TO REVISE THIS COURT'S PRONOUNCEMENTS ON INCORPORATED RIGHTS GENERALLY, OR THE FIRST AMENDMENT SPECIFICALLY 21

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Beauharnais v. Illinois, 343 U.S. 250 (1952) 23
Bowen v. Gilliard, 483 U.S. 587 (1987) 24
City of Rome v. United States, 446 U.S. 156 (1980) 2
The Civil Rights Cases, 109 U.S. 3 (1883) 2,15,16
Employment Division v. Smith, 494 U.S. 872 (1990) . . 2,3
Everson v. Board of Education, 330 U.S. 1 (1947) . . 23,24
Ex Parte Oppenstein, 233 S.W. 440 (1921) 19
Ex Parte Virginia, 100 U.S. 339 (1879) 15
Fay v. New York, 332 U.S. 261 (1947) 22
Fullilove v. Klutznick, 448 U.S. 448 (1980) 2
Gitlow v. New York, 268 U.S. 652 (1925) 23
Interstate Circuit, Inc., v. Dallas, 390 U.S. 676 (1968) 23
Katzenbach v. Morgan, 384 U.S. 641 (1966) . . . . . *passim*
Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 25
Lassiter v. Northampton Election Board,
360 U.S. 45 (1959) 3
Marsh v. Chambers, 463 U.S. 783 (1983) 23,24
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 23
Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 22
New York Times v. Sullivan, 376 U.S. 254 (1964) 24
Norwegian Nitrogen Products Co. v. United States,
288 U.S. 294 (1933) 19
Oregon v. Mitchell, 400 U.S. 112 (1970) . . . . . *passim*
Palko v. Connecticut, 302 U.S. 319 (1937) 23
Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) . . 3,24
Roth v. United States, 354 U.S. 476 (1957) 23
Sable Communications of Calif., Inc. v. FCC,
492 U.S. 115 (1989) 25

Smith v. California, 361 U.S. 147 (1959) 23
Turner Broadcasting System v. FCC, 512 U.S. ___, 114 S. Ct. 2445 (1994) 25
United States v. Great Northern Ry., 287 U.S. 144 (1932) 19
United States v. Guest, 383 U.S. 745 (1966) 18
United States v. Harris, 106 U.S. 629 (1882) . . . 13,14,15
United States v. Pfitsch, 256 U.S. 547 (1921) 19
United States v. Wheeler, 254 U.S. 281 (1920) 15
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 23

CONSTITUTION AND STATUTES:

U.S. Const.:
Art. I, § 8, cl. 18 14
Art. I, § 9, cls. 2-3 25
Art. I, § 10, cls. 1-3 12,13
Art. II, § 3 15
Art. IV, § 2 6
Amend. I 22
Amend. V 6
Amend. XIV:
§ 1 . . . . . *passim*
§ 2 17
§ 3 17
§ 5 . . . . . *passim*
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 9
Religious Freedom Restoration Act, 42 U.S.C.
§ 2000bb: 2
§ 2000bb(a), (b) 3
42 U.S.C. § 1973b(e) 3
42 U.S.C. § 1983 28

MISCELLANEOUS:

1 The Debates and Proceedings in the Congress of the United States (Gales & Seaton,1834):
p. 729 25
p. 730 26
Cong. Globe, 39th Cong., 1st Sess. (1866):
p. app. 133 6,27
p. app. 134 6
p. 1034 6
p. 1063 7
p. 1064 7,26,27
p. 1082 7
p. 1087 6
p. 1094 7,8
p. 1095 8,20
p. 1270 26
pp. 1292-93 9
p. 2459 9
pp. 2459-60 17
p. 2766 9,16
p. 2768 16,18
Cong. Globe, 42d Cong., 1st Sess. (1871):
p. 572 27
p. app. 83 10
p. app. 84 12
p. app. 115 5,12
p. app. 117 13
p. app. 153 16
p. app. 151 11,12
p. app. 160 16
p. app. 221 12
p. app. 242 27
p. app. 259 13

p. app. 260 12
p. app. 315 13
Cong. Rec. 43d Cong., 1st Sess. app. 244 (1874) 16
H.R. Rep. No. 88, 103d Cong., 1st Sess.(1993) 2
S. Rep. No. 11, 103d Cong., 1st Sess. (1993) 2
Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993) 3
Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991) 25
Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331 (1967) 19
Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79 19
Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv.L. Rev. 1 (1955) . . 19
Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) 3,22
Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) 3
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John Hart Ely, *Democracy and Distrust* (1980) 25
Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan.L. Rev. 5 (1949) 4
Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965) 23

Horace Flack, *The Adoption of the Fourteenth Amendment* (1908) 5
John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992) 10
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Joseph B. James, *The Framing of the Fourteenth Amendment* (1956) 5
Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* (1966) 26
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Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* (1990) 19
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William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988) 10
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BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Petitioner.[1] Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the

[1] Consent to the filing of this brief has been granted by counsel for all parties *via* a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

Constitution and democratic government, particularly in the areas of federalism and states' rights. Because this case raises questions relating to the proper bounds of federal power, we believe our perspective will complement the briefs of the parties and assist the Court in the resolution of the issues at hand.

SUMMARY OF ARGUMENT

In enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, Congress stated expressly that Section 5 of the Fourteenth Amendment supplied its authority. S. Rep. No. 11, 103d Cong., 1st Sess. 13-14 (1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993). It is not remarkable that Congress would rely on Section 5. Congress has enacted numerous laws under this authority, most of which have been upheld by this Court. *E.g.*, *City of Rome v. United States*, 446 U.S. 156 (1980); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *The Civil Rights Cases*, 109 U.S. 3 (1883). What is remarkable about Congress's action is that Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," and RFRA imposes on the states extra-constitutional burdens that this Court has held are not required by the Fourteenth Amendment itself. *Employment Division v. Smith*, 494 U.S. 872 (1990).

RFRA is a fulfillment of the Court's holding in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that Congress could "prohibit the enforcement of . . . state law" under Section 5 "[w]ithout regard to whether the judiciary would find [that Section 1 of the Fourteenth Amendment so required]." *Id.* at 649. *Morgan* has been read as approving Section 5 both as remedial authority to "eliminate the case-by-case process of adjudicating

constitutional violations"[2] (*see id.* at 652-53) and as a substantive power by which Congress may determine for itself the meaning of the Fourteenth Amendment (*id.* at 653-56).[3] In *Morgan*, this Court upheld a provision of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), that forbid English literacy requirements as a qualification to vote even though this Court had previously upheld the constitutionality of such requirements. *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959). Stating that the "language [and] history" (*Morgan*, 384 U.S. at 648) of the Fourteenth Amendment supported its view, the Court held that Congress could compel or forbid state practices even where this Court had held that the practice did not violate the Fourteenth Amendment. So long as Congress does not "restrict, abrogate, or dilute [the Fourteenth Amendment's] guarantees" (*id.* at 651 n.10), there are no apparent restrictions on what Congress can enact in the name of due process and equal protection.[4]

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[2] Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 42 (1995).

[3] *Id.* at 46-53; Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1616-24 (1995).

[4] While some members of the Court have described *Morgan* as resting on deference to congressional fact finding, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.; plurality opinion); *Oregon v. Mitchell*, 400 U.S. 112, 248-49 (1970) (Brennan, J., concurring and dissenting), no such deference can be given to Congress in RFRA. Congress has stated as plainly as it can that it disagrees with the Court on the meaning of the First Amendment. 42 U.S.C. § 2000bb(a), (b) (RFRA "restores" the compelling interest test "virtually eliminated" in *Employment Division*). *See also Remarks on Signing the Religious Freedom Restoration Act of 1993*, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993) (RFRA "reverses" the Court's decision in *Employment Division*). Whatever construction of *Morgan* might be had in other circumstances, in RFRA Congress took from *Morgan* the most aggressive approval of its powers.

Justice Harlan, joined by Justice Stewart, dissented in *Morgan*. He would have held that Section 5 gave Congress power "to take appropriate remedial measures to redress and prevent. . . wrongs," but that its remedial authority depended on "recognized state violations of federal constitutional standards hav[ing] occurred." 384 U.S. at 666 (Harlan, J., dissenting). Otherwise, he reasoned, if Section 5 were a substantive power, "Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution." *Id.* at 667-68. Justice Harlan's warning has been borne out in RFRA.

Justice Brennan's majority opinion and Justice Harlan's dissenting opinion mirror precisely the debates of an earlier generation over the scope of Congress's power under the Fourteenth Amendment. Those debates tell a tale of two provisions: The first was Representative John Bingham's original proposed amendment, which would have given Congress plenary authority to revise the laws of the states to secure equal protection of life, liberty and property. As discussed in greater detail herein, Bingham's proposal was widely understood as substantive authority, conferring upon Congress the original power to enact uniform laws, to secure *equal* protection by providing the *same* protection nationwide. The second provision, a proposal that became our Fourteenth Amendment, enjoined the states from denying equal protection and due process of law and gave Congress the power to "enforce, by legislation, [those] provisions." U.S. Const. Amend. XIV, § 5. The amendment was contemporaneously understood to require equality within each state's laws and to empower Congress with remedial authority, the authority to enforce the provision when a state failed to observe it.

As we show in Part I, this Court in *Morgan* effectively resurrected John Bingham's original proposal — which had been,

as one Representative put it, "given its quietus . . . where it slept the sleep that knows no waking" (Cong. Globe, 42d Cong., 1st Sess. app. 115 (1871) (statement of Rep. Farnsworth)) — and rejected the more modest enforcement power actually granted Congress in Section 5. *See* 384 U.S. at 650 & n.9. This reading is completely inconsistent with the "text [and] history" *Morgan* purported to rely on. To the extent *Katzenbach v. Morgan* stands for such a proposition, it should be overruled. In Part II, we demonstrate that, even if the *Morgan* power is a reasoned interpretation of Section 5 it should be extended to incorporated rights and, in particular, the First Amendment.

ARGUMENT

I. SECTION 5 DOES NOT GRANT CONGRESS THE POWER TO ENFORCE EXTRA-CONSTITUTIONAL RIGHTS; *KATZENBACH v. MORGAN* IS INCONSISTENT WITH THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT AND SHOULD BE OVERRULED.

A. Bingham's Proposed Amendment And Congress's Power to Make Uniform National Laws

When the Thirty-Ninth Congress assembled in December of 1865, it formed a 15 member bi-partisan Joint Committee on Reconstruction to draft various pieces of legislation, including a new amendment to the Constitution.[5] In February 1866, a mem-

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[5] *See Oregon v. Mitchell*, 400 U.S. at 155-67 (Harlan, J., concurring and dissenting) (recounting history of Fourteenth Amendment). Other useful chronologies of these events are found in Horace Flack, *The Adoption of the Fourteenth Amendment* (1908); Joseph B. James, *The Framing of the Fourteenth Amendment* (1956); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949).

ber of the Joint Committee, Ohio Republican John Bingham, proposed an amendment. It read in its entirety:

> ARTICLE __. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Bingham explained that his proposal constituted "an express grant of power upon the Congress" and followed language from the Comity Clause (Art. IV, § 2) and the Due Process Clause (Amend. V). *Id.* Three days of intense debate followed in the House.

Immediately following Bingham's introduction of the proposed amendment, Representative A.J. Rogers, a New Jersey Democrat and member of the Joint Committee, rose to speak. Rogers argued that the proposal was "the embodiment of centralization and the disfranchisement of the States," and its effect was to "take away the power of the States; and to interfere with the internal police and regulation of the States." Cong. Globe, 39th Cong., 1st Sess. app. 133, 134 (1866). Rogers was not alone, and his concerns held sway on both sides of the aisle. *See Oregon v. Mitchell*, 400 U.S. at 260 (Brennan, J., concurring and dissenting). Democrat Garrett Davis criticized the Bingham proposal as a "grant for original legislation by Congress. . . . [Congress] . . . is itself the judge of the measure of [equal] protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it make it equal." Cong. Globe, 39th Cong., 1st Sess. 1087 (1866). Republican Robert Hale of New York thought it would be easy enough to show that "every State in this Union fails to give equal

protection to all persons within its borders in the rights of life, liberty, and property." *Id.* at 1064. Hale assailed Bingham's proposal as "a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, . . . may be overridden, may be repealed or abolished, and the law of Congress established instead." *Id.* at 1063.

On the Senate side, Republican Senator William Stewart, a supporter of the legislation, understood Bingham's proposal in much the same way, as a power to make the laws in the states not only *equal*, but the *same*. Quoting Bingham's proposal, Stewart observed:

> Congress shall have power by law to make all the laws in all the States affecting the protection of either life, liberty, or property, precisely similar; . . . . Congress must examine and modify all these laws, so that they shall afford the same protection in all the States that they do in any. The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures . . . .

Cong. Globe, 39th Cong., 1st Sess. 1082 (1866).

Representative Bingham himself had the opportunity to deny that this was both the intent and the effect of his proposal. Late in the House debates, Hale asked Bingham directly "whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property." Cong. Globe, 39th Cong., 1st Sess. 1094

(1866). Bingham obfuscated: "It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." *Id.* The last Representative to speak was New York's Giles Hotchkiss, who began with the observation that "Constitutions . . . should be so plain that the common mind can understand them." *Id.* at 1095. He too objected that while the "object in . . . proposing this amendment is to provide that no State shall discriminate between its citizens," the Bingham proposal "by its terms . . . authorize[s] Congress to establish uniform laws throughout the United States upon . . . the protection of life, liberty, and property." *Id.* He questioned whether the Bingham proposal would actually result in the equality Bingham advocated, since subsequent Congresses could revise the laws at will. Instead, Hotchkiss proposed, "[w]hy not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens." *Id.* The House then voted 110 to 37 to table Bingham's proposal, with Representative Bingham himself voting to postpone. *Id.* It was never reconsidered.

B. The Fourteenth Amendment And Congress's Power to Enforce Equal Protection of State Laws

In May 1866, Republican Representative Thaddeus Stevens, a member of the Joint Committee, introduced a redrafted proposed amendment. The new proposal was substantially the same as our Fourteenth Amendment.[6] In contrast to Bingham's proposal, which authorized Congress to define equal protection, Section 1 of the proposed amendment directly prohibited the states from denying equal protection and due process of law. According to Stevens, it would allow Congress "to correct the unjust legislation of the States, so far that the law which operates

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[6] The only significant change in Section 1 was the addition of the Citizenship Clause.

upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same extent." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (emphasis in original). When Senator Jacob Howard introduced the proposed amendment in the Senate, he similarly emphasized that Section 1 was a direct prohibition on the states, an equality provision, that forbade "the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 2766. According to Howard, Section 5 was a "delegation of power to Congress to carry out all the principles of all these guarantees." *Id.* Section 1 of the proposed amendment occasioned surprisingly little debate. The proposed amendment was adopted in June 1866 and ratified by the states in 1868.

The contrast between Bingham's proposal and the Fourteenth Amendment is stark. Both had as their objective the securing of equal protection, but they suggested radically different means of achieving that end. In the views of members of Congress, Bingham's proposal would have ensured equal laws by making them the same; it would have given Congress authority to enact uniform laws. Since Congress would have plenary authority to enact laws to secure all privileges and immunities and equal protection, Congress would have simply displaced state laws with federal law, thereby guaranteeing not just equal laws but the same laws. On the other hand, Section 1 of the Fourteenth Amendment guarantees equality under the law, but does not demand uniform laws. This is consistent with the admitted purposes of the Fourteenth Amendment, one of which was to constitutionalize the Civil Rights Act of 1866. *See* Cong. Globe, 39th Cong., 1st Sess. 1292-93 (1866) (statement of Rep. Bingham). That Act provided that all persons should enjoy "the same [civil] right[s] in every State . . . as [are] enjoyed by white citizens, and shall be subject to like punishment." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The Civil Rights Act promised that whatever substantive laws a

state adopted protected equally white and black citizens.[7] The Fourteenth Amendment does not require national uniformity in order to guarantee equality; it recognizes the continued vitality of the states, but imposes a duty on them to provide equal protection to all of their citizens and gives Congress the power to enforce that duty.

This understanding of the substantial differences between the two provisions was confirmed in the civil rights enforcement debates in 1871. In those debates, which were far more detailed than the debates of 1866, members of Congress argued over the scope of the Fourteenth Amendment and, in particular, the relationship between Sections 1 and 5. John Bingham argued that the Fourteenth Amendment and his earlier, failed proposal were not only substantially the same, but that Congress actually had acquired *greater* power under the Fourteenth Amendment. After claiming authorship of the Fourteenth Amendment and quoting Sections 1 and 5, Bingham stated:

> The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871).

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[7] *See* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 118 (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1410-13 (1992).

Bingham's contention was carefully answered by fellow Ohio Republican James Garfield, who disagreed with Bingham's characterization and explained the difference:

> The [Fourteenth Amendment] exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State over these subjects. The [Bingham proposal] gave Congress plenary power to cover the whole subject with its jurisdiction . . . to the exclusion of the State authorities.

Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871). Then Garfield related that

> it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution . . . it became perfectly evident, both to the members of the Senate and of the House, . . . that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn.

Id. Garfield concluded, "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [Section 5] . . . the force and effect of the

rejected clause." *Id.* In like fashion, John Farnsworth of Illinois confronted Bingham, quoted extensively from the 1866 debates, and then cited lengthy passages from Thaddeus Stevens' speeches to show that the Bingham proposal "was abandoned and a different amendment substituted, different in form and substance, and so understood by Congress." *Id.* at app. 115.

C. The Consequences of the Framers' Choice of the Fourteenth Amendment Over Bingham's Proposal

As members of Congress made clear in the debates of 1866 and 1871, the Bingham proposal was a pure grant of power to Congress. The proposal had no self-enforcing provision, no provision that was judicially enforceable. Under the Bingham proposal, Congress would have been the sole judge of what privileges and immunities and protection of life, liberty and property citizens should possess. Section 1 of the Fourteenth Amendment, by contrast, was judicially enforceable in the same way as the state disabilities in Article I, Section 10, after which it was patterned. *See* Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham) (describing that he had imitated Article I, Section 10 with the phrase "No State shall"). *See also id.* at app. 260 (statement of Rep. Holman); *id.* at app. 221 (statement of Sen. Thurman).

There are two consequences of the framers' choice between the Bingham proposal and our present Fourteenth Amendment: first, enforcement of Section 1 lies primarily, although not exclusively, with the judiciary; second, a prerequisite to congressional enforcement of Section 1 is a finding that the states have violated that Section.

1. Judicial Interpretation and Enforcement of Section 1

The framers of the Fourteenth Amendment understood that Section 1, like the other provisions of the Constitution that begin with the words "No State shall" (Art. I, § 10, cls. 1-3) would be enforced principally by the courts.

> The first Section of the amendment requires no legislation; "it is a law unto itself," and the courts can execute it. If it requires "enforcing" legislation, what kind does it require? Certainly not a law which goes a long way beyond the scope of the provision. . . . [T]he only "legislation" we can do is to "enforce" the provisions of the Constitution upon the laws of the State.

Cong. Globe, 42d Cong., 1st Sess. app. 117 (1871) (statement of Rep. Farnsworth). Representative Holman argued that Section 1 was a "positive limitation and nothing more," and that when states violated Section 1, no one should "doubt the completeness of the remedy . . . . The Supreme Court will declare the law void." *Id.* at app. 259. *Accord id.* at app. 315 (statement of Rep. Burchard).

The Court confirmed this understanding in *United States v. Harris*, 106 U.S. 629 (1882). In that case the Court struck down a section of the Civil Rights Act of 1871 making it criminal for private persons to interfere with the "equal privileges and immunities under the laws." The Court denied that Section 5 could sustain the act because the Fourteenth Amendment referred to state action exclusively. In the process the Court suggested the remedial limits of the Amendment:

> The language of the Amendment does not leave this subject in doubt. When the State has

> been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, *the Amendment imposes no duty and confers no power upon Congress.*

Id. at 639 (emphasis added).

2. Congressional Enforcement of Violations of Section 1

The second implication of the framers' choice between the Bingham proposal and our Fourteenth Amendment is precisely what Section 5 says: Congress has power to *enforce* the Amendment. When Section 5 is read side by side with Bingham's proposal, it becomes evident that the term "enforce" is a term of limitation on what could have been a much broader grant of power to Congress. Congress, of course, was not deprived of any power at all in the Fourteenth Amendment. Section 5 is plainly a grant of authority, but it is not the unbounded grant that was the original Bingham proposal. Nor is it merely a Necessary and Proper Clause (Art. I, § 8, cl. 18). There are two significant differences. The Necessary and Proper Clause authorizes Congress to pass laws to "*execute*" the "*powers*" of the federal government. Section 5 grants Congress the power to "*enforce*" the "*provisions*" of the Amendment. "Execute" is a broader term than "enforce." The President's power to "take Care that the Laws

be faithfully executed" (Art. II, § 3) encompasses not only the power to charge past violations of the law, but the power to administer, to regulate, and to promulgate standards for future application. Section 5 grants Congress the power to "enforce": it is the power to see that laws are observed.

On the other hand, the Necessary and Proper Clause applies to the "powers" of the government, while Section 5 applies to "provisions." Powers are those things the federal government is affirmatively authorized to do, in contrast to disabilities, prohibitions, or restrictions on federal power. Thus, despite the broad scope of the Necessary and Proper Clause, the Court has held that Congress has no power to execute certain clauses in the Constitution, such as the Comity Clause which, as a restriction on the states, is self-enforcing. *United States v. Wheeler*, 254 U.S. 281, 293-94 (1920); *United States v. Harris*, 106 U.S. 629, 643-44 (1882). Section 5, by contrast, applies to the "provisions" of the Fourteenth Amendment. As the first Justice Harlan observed in *The Civil Rights Cases*, the purpose of Section 5 is "to enforce 'the *provisions* of *this article*' of Amendment; not simply those of a prohibitive character, but the provisions — *all* of the provisions — affirmative and prohibitive, of the Amendment." 109 U.S. at 46 (Harlan, J., dissenting) (emphasis in original). In this respect Section 5 is broader than the Necessary and Proper Clause. Congress may enforce all of the provisions of the Fourteenth Amendment, but it is limited to just that — "enforcement." *See The Civil Rights Cases*, 109 U.S. at 11; *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879).

The term "enforce," when read together with Section 1, means that Congress may enact "appropriate legislation" when the states have violated Section 1. Senator Howard, as he introduced the redrafted proposed amendment in the Senate, explained that Section 1 was a "restrain[t] [on] the power of the States . . . [and] not powers granted to Congress." Cong. Globe, 39th Cong., 1st

Sess. 2766 (1866). When he read Section 5 together with Section 1, he said it "cast[] upon Congress the responsibility of seeing . . . that all the sections of the amendment are carried out. . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.* at 2768. *See* Cong. Globe, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay). James Garfield agreed that "[w]henever such a state of facts is clearly made out, . . . the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871). And as Senator Norwood said, "until a State shall attempt to abridge [a citizen's] rights, Congress has no power to act." Cong. Rec., 43d Cong., 1st Sess. app. 244 (1874).

The Court confirmed this understanding in *The Civil Rights Cases*, 109 U.S. 3 (1886). Section 5 did "not authorize Congress to create a code of municipal laws for the regulation of private rights." *Id.* at 11. Rather, Congress's authority was remedial in nature, "provid[ing] modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment." *Id.*

D. *Morgan's* Reliance on the "Language [and] History" of the Fourteenth Amendment Is Flawed

This history points inexorably to the conclusion that this Court's holding in *Morgan* went too far. The Court purported to have relied on the "language [and] history" of Section 5 (384 U.S. at 648), yet the Court only cited secondary sources and a single statement by Senator Jacob Howard. This is a thin reed on which to have based so important a proposition. Moreover, the Court cited the secondary sources for the unremarkable observation that

"the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary." 384 U.S. at 648 n.7. That statement is true, but irrelevant. Bingham was "interested" in augmenting Congress's power, but, as we have seen, he was not entirely successful in his efforts. For the framers, the most controversial provisions within the Fourteenth Amendment were Sections 2 (representation in Congress) and 3 (disability from holding public office for those engaging in rebellion). *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2459-60 (1866) (statement of Rep. Stevens) (Section 2 was "the most important in the article"; Section 3 "may encounter more difference of opinion here"). Both of these sections required congressional action and enforcement. On the basis of Sections 2 and 3 alone, it could be said that Congress was primarily interested in augmenting its own power.

More significantly, the Court cited only a single statement of Senator Howard for the expansive proposition that "[a] construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." 384 U.S. at 648. The Court quoted Howard:

> [Section 5] casts upon Congress the responsibility of seeing to it, for the future that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.

384 U.S. at 648-49 n.8 (quoting Cong. Globe, 39th Cong., 1st Sess. 2768 (1866)). The Court then commented that Howard's statement was "not questioned by anyone in the course of the debate." *Id.*

Senator Howard's imprecise statement does not support the Court's conclusion. First, as Howard made clear, the power of Congress is the power to "*correct*" state laws in "conflict" with the Fourteenth Amendment. It is not, as the Court held in *Morgan*, the power to *prescribe* law in opposition to the Court's express finding that no violation of the Fourteenth Amendment has occurred. Second, even if Howard's statement could be said to support the Court's holding, the Court cited only Howard, ignoring the larger context for the adoption of the revised amendment. It was passed against the background of a far more aggressive proposal, one that would have given Congress far greater discretion — one that Congress had concluded it could not submit to the states for ratification.

Finally, despite the obvious differences between the Bingham proposal and the Fourteenth Amendment, this Court in *Morgan* simply conflated the two. The Court declared that Section 5 "grant[ed] to Congress . . . the same broad powers expressed in the Necessary and Proper Clause." 384 U.S. at 650. *See also United States v. Guest*, 383 U.S. 745, 782-83 (1966) (Brennan, J., concurring and dissenting in part). The Court justified this because John Bingham considered his proposal and the Fourteenth Amendment coextensive and, as the Court noted, "earlier drafts of the proposed Amendment employed the 'necessary and proper' terminology to describe the scope of congressional power under the Amendment." 384 U.S. at 650 n.9. Looking to language that drafters rejected may be an interpretive guide to the language actually adopted, but the inference the Court draws is exactly the wrong one. If any inference at all is to be taken from language considered and rejected, it is that the

rejected language was *not* intended. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 306 (1933); *United States v. Great Northern Ry.*, 287 U.S. 144, 155 (1932); *United States v. Pfitsch*, 256 U.S. 547, 550-52 (1921). *See also Ex Parte Oppenstein*, 233 S.W. 440, 444 (Mo. 1921). It is ironic that the Court read Bingham's proposal into Section 5 *nunc pro tunc*. The framers of the Fourteenth Amendment knew how to say "necessary and proper," and they considered and rejected that formulation.[8]

E. *Morgan* Grants Even Greater Powers to the United States Than Would Have Been Conferred Under Bingham's Rejected Proposal

The Court's holding in *Morgan* not only embraces the powers Congress would have acquired in the Bingham proposal, it goes much further. Under the Bingham proposal, Congress would have been the exclusive judge of what privileges and

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[8] *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 97 ("Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. . . . [T]he power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met."); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 60 (1955) ("Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by 'necessary and proper' power."). *See also* Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869*, at 92 (1990) (arguing that any construction of Section 1 must not be "subject to the objections that caused the rejection of Bingham's original amendment"); Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331, 381 (1967) ("The result of [*United States v. Guest*, 383 U.S. 745 (1966)] is to resurrect the rejected first draft of the Bingham amendment . . . and enshrine it in all of its glory into the fourteenth amendment.").

immunities were required, and what constituted equal protection of life, liberty and property. That meant that under the Bingham proposal, Congress could have expanded or contracted rights, and the Court would have been powerless to correct it because there would have been no standards in the amendment for judging Congress. This was one of the main criticisms of the Bingham proposal, that the entire matter was left to the "caprice" of Congress. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Yet, after *Morgan*, the Court sets the baseline and Congress may improve upon, but not take away from, that baseline. The so-called *Morgan* "ratchet" is thus far more state-restrictive than the Bingham proposal because it allows change in one direction only. It engages both the Court and the Congress independently in the process of declaring and then enforcing broad concepts of equal protection and due process.

If the Court is to be taken at its word in *Morgan*, there are no apparent limits to what extra-constitutional standards Congress may impose on the states (so long as it does not cross the Court's baseline). For example, Congress might prescribe the substantive grounds upon which search and seizures may be conducted, restricting the states even more than required by the Fourth Amendment. It could prescribe the number of jurors required in criminal cases, or the qualifications for counsel assisting the accused. Indeed, Congress could enact laws nullifying otherwise constitutional municipal anti-obscenity ordinances. That Congress has not done so or, in the judgment of some, would not do so is quite irrelevant. The question is one of authority, not will. *Morgan* certainly indicates that Congress possesses the authority to do all these things.[9]

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[9]These examples are taken from William Van Alstyne, *An Essay On the Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. ___ (forthcoming November 1996).

In sum, *Morgan* rests on a seriously flawed reading of the Fourteenth Amendment, one that is inconsistent with its text and history. A careful reading of Sections 1 and 5 gives Congress the authority to enact corrective legislation when the courts have held — or would hold — that laws or practices violate the commands of Section 1. It does no violence to the Fourteenth Amendment to conclude that Congress may anticipate, in good faith, that certain state laws and practices, if challenged in court, would violate Section 1. And Congress may engage in its own factual inquiry into such laws and practices and bring its own insights and findings to a conclusion that state laws and practices violate the terms of the Fourteenth Amendment. But it surely does great violence to the Fourteenth Amendment to say that Congress has "enforce[d] [the Fourteenth Amendment] through appropriate legislation" when it proscribes, penalizes, or otherwise corrects state actions that the federal judiciary has declared are fully consistent with the provisions of the Constitution.

II. EVEN ASSUMING THAT THE *MORGAN* POWER MAY BE LEGITIMATELY EXERCISED IN SOME CASES, IT SHOULD NOT BE INVOKED TO REVISE THIS COURT'S PRONOUNCEMENTS ON INCORPORATED RIGHTS GENERALLY, OR THE FIRST AMENDMENT SPECIFICALLY.

Even if *Morgan* represented a considered and principled view of Congress's power to secure the broad contours of equal protection and due process, it should not extend to the specific rights incorporated through the Due Process Clause. It is particularly inappropriate that Congress enforce against the states

a provision that begins "Congress shall make no law . . . ." Amend. I.[10]

In *Morgan* this Court refused to "confine the legislative power" to the task of "particularizing the 'majestic generalities' of § 1." 384 U.S. at 648-49 (*quoting Fay v. New York*, 332 U.S. 261, 282 (1947)). Elsewhere this Court has referred to the "controversies [that] have raged about the cryptic and abstract words of the Due Process Clause." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Because the Equal Protection and Due Process Clauses embrace both majestic and cryptic qualities, it is understandable that in this area the Court would respect "congressional resourcefulness and congressional responsibility for implementing the Amendment." *Morgan*, 384 U.S. at 648.

The majestic generalities of the Fourteenth Amendment become far less abstract once the subject matter changes from equal protection or procedural due process *simpliciter* to the Bill of Rights. Due process rights defined in terms of the First Amendment, for example, are far more specific than the amorphous promise of procedural due process.

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

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[10] *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995).

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). In the process of incorporating most of the Bill of Rights under the Fourteenth Amendment, the Court has moved deliberately from the position of uncovering rights in a "scheme of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), to applying the precise text of the Bill of Rights.[11] Accordingly, in *Everson v. Board of Education*, the Court recognized that "[t]he First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" 330 U.S. 1, 8 (1947).

The process of incorporation has become so complete that there is no perceptible difference between the First Amendment as applied to the federal government and the First Amendment (incorporated through the Fourteenth) as applied to the states. The Court has long since rejected arguments that First Amendment rights incorporated against the States are subject to a lesser standard than when the First Amendment is applied to the federal government. *See, e.g., Interstate Circuit, Inc., v. Dallas*, 390 U.S. 676, 706 (1968) (Harlan, J., concurring and dissenting) (advocating dual standards); *Memoirs v. Massachusetts*, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting); *Smith v. California*, 361 U.S. 147, 169-70 (1959) (Harlan, J., concurring and dissenting); *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring and dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288-91 (1952) (Jackson, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). More recently, the Court has rejected the argument that the Fourteenth Amendment "impos[es] more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Marsh*

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[11] *See* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746, 747-48 (1965).

v. Chambers, 463 U.S. 783, 790-91 (1983). The Court has also relied on the history of the Bill of Rights as the explanation for those same rights when incorporated against the states. *See, e.g., Marsh v. Chambers*, 463 U.S. at 786-92 (using history of congressional chaplains in challenge to constitutionality of state legislative chaplains); *New York Times v. Sullivan*, 376 U.S. 254, 276-77 (1964) (stating that there is "no force in [the] argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States"); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (discussing history of religious liberty during colonial period in challenge to state busing scheme). In effect, the Court has incorporated the history of the first eight amendments along with the text itself into the Fourteenth Amendment Due Process Clause.

Incorporated rights claim an entirely different provenance, however, than equal protection and procedural due process rights. The latter, by nature, are rights in which the legislature has had a firm hand in shaping. Congress may specify the procedural protections afforded certain rights, and it must routinely make judgments about equal treatment in the allocation of scarce governmental resources. In such cases, some judicial deference is appropriate. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.; plurality opinion); *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987). Because these are matters on which Congress has experience, it might be concluded that Congress could use the *Morgan* power to correct legislation of the states.

All of this suggests that a different result should obtain when Congress attempts to use the *Morgan* power to enforce the specific commands of the Bill of Rights. Incorporated rights are not matters upon which Congress has great legislative expertise. Matters involving speech and press, search and seizure, self-incrimination, and impartial juries are not areas to which the Court has felt the same obligation of deference. *See, e.g., Turner*

Broadcasting System v. FCC, 512 U.S. ___, 114 S. Ct. 2445, 2471 (1994); *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Moreover, among the rights guaranteed in the Bill of Rights, the First Amendment is unique, and the *Morgan* power should not extend to revising the Court's opinions as a means of "enforc[ing]" the Fourteenth Amendment. By its plain terms, the First Amendment binds Congress alone. And if reference to "Congress" were not sufficiently clear, the Amendment reemphasizes that it is a prohibition on the making of laws.[12] Not only does Congress not have the same experience with the First Amendment as it has with equal protection and due process, the Constitution declares Congress ill-suited to acquire or exercise such expertise.

The declaration of congressional disability embodied in the words "Congress shall make no law" was placed in the First Amendment by design. James Madison's original proposal began, "no religion shall be established by law . . . ." 1 The Debates and Proceedings in the Congress of the United States 729 (Aug. 15, 1789) (Gales & Seaton, 1834). When Representative Huntington objected that this language might be "extremely hurtful to the cause of religion" and would forbid federal courts from enforcing contracts between congregations and their ministers in the

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[12] In this regard, compare Article I, Section 9, Clauses 2 and 3. Clause 2 provides that "Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Clause binds all of the departments of the federal government. By contrast, Clause 3 states: "No Bill of Attainder or ex post facto Law *shall be passed*" (emphasis added). Section 3 applies to the law making branches and not to the judiciary, whose review is necessarily retrospective. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1205 n.330 (1991) (citing John Hart Ely, *Democracy and Distrust* 90 (1980)).

Northeast, the drafters responded by changing the proposed amendment to its present form of "Congress shall make no law." *Id.* at 730. The drafters later extended the language to speech, press and petition. These changes ensured that the federal judiciary could enforce state laws respecting religion, speech and press in cases properly within federal jurisdiction.[13] These changes deliberately left the judiciary free to issue injunctive prior restraints when equity so required.[14] The Constitution consciously uses the term "Congress" in the First Amendment.

The framers of the Fourteenth Amendment recognized the unique status of the First Amendment. During the debates of 1866, Representative Hale commented that the guarantees of the Bill of Rights "are not matters upon which legislation can be based. They begin with the proposition that 'Congress shall make *no law*', . . . and . . . [t]hroughout they provide safeguards to be enforced by the courts, and not to be exercised by the Legislature." Cong. Globe, 39th Cong., 1st Sess. 1064 (1866) (emphasis in original). *See also id.* at 1270 (statement of Rep.

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[13] Mark DeWolfe Howe, *The Garden and the Wilderness* 22-23 (1965); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U.L. Rev. 1156 (1986).

[14] Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* (1966); Leo Pfeffer, *Church, State & Freedom* 115-16 (1953); Leonard W. Levy, *The* Legacy *Reexamined*, 37 Stan. L. Rev. 767, 767 (1985); Leonard W. Levy, *On the Origins of the Press Clause*, 32 U.C.L.A. L. Rev. 177, 206-07 (1984). Professor Meiklejohn's question is as relevant today as it was forty years ago: "The fact of governmental power is not, then, a proof of congressional power. . . . [T]he question before us is not, 'Has the government of the United States authority to nullify the First Amendment, wholly or in part.' Our very different question is, 'Has Congress that authority?'" Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461, 465 (1953). The Department of Justice has itself suggested this question. *See* Department of Justice, Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 16-17 & nn. 24-25 (1986).

Kerr). Indeed, Hale suggested that the opening phrase in the First Amendment, "Congress shall make no law," might be "a sufficient prohibition" against further legislation. *Id.* at 1064. Representative Rogers observed that "any power to override a State and settle . . . the rights, privileges, and immunities of citizens in the several States . . . was left entirely for the courts." *Id.* at app. 133.

Even more to the point, in the enforcement debates of 1871, members of Congress expressly stated that Congress's general powers under Section 5 could not trump Congress's specific disability in the First Amendment. As Senator Bayard stated, "an implied power to Congress" could not overcome the Bill of Rights, which was "a distinct and affirmative inhibition of power to Congress." Cong. Globe, 42d Cong., 1st Sess. app. 242 (1871). Perhaps most presciently, Senator Stockton denied that the First Amendment could be enforced through Section 5:

> No act of Congress can authorize or make a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. Would it be appropriate legislation to enforce this amendment that Congress should pass an act prohibiting a State from doing so or directing it to do so? Congress is simply restrained from doing this itself.

Id. at 572.

Although Congress is disqualified from prescribing substantive First Amendment standards, this Court need not conclude in this case that Congress is barred from enacting any legislation to enforce First Amendment rights. It need only conclude that Congress may not exercise the *Morgan* power to

command state accommodation of religion when this Court has held that the states are not so constitutionally compelled. Nothing we have said here infringes Congress's power to correct state laws or practices that violate the First Amendment. Congress may continue to enforce the First Amendment through remedial provisions such as 42 U.S.C. § 1983. But neither the First Amendment nor Section 5 will support Congress's attempt to correct this Court and instruct the states. RFRA is simply beyond Congress's power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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